



SO ORDERED.

SIGNED this 04 day of January, 2006.

Dale L. Somers

Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

**JOHN HERMAN SCHMIDT and
PATSY LEE SCHMIDT,**

DEBTORS.

**CASE NO. 04-24766
CHAPTER 13**

**MEMORANDUM GRANTING CREDITORS'
MOTIONS TO DISMISS AND
FINDING CREDITORS' MOTION TO SHOW CAUSE MOOT**

On August 4, 2005 and August 19, 2005 the Court held evidentiary hearings on three motions:

(1) the Motion to Dismiss Debtors' Bankruptcy¹ filed by creditors Gaylon Albright, Alan Combs as Executor of the Estate of Madeline L. Moore, Alan D. Combs, Craig S. Combs, Charles & Linda

¹ Doc. 59.

Kannady, Stacy & Brian Krennig, David Parnell, Melvin Parnell, Robert Sandusky, and Robert & Betty Seibel (hereafter collectively Creditors); (2) the Second Motion to Dismiss Debtors' Bankruptcy² filed by the Creditors; and (3) the Motion for Order to Show Cause and to Appear³ also filed by the Creditors. Debtors, John Herman Schmidt and Patsy Lee Schmidt (collectively Debtors), appeared in person and by Jonathan C. Becker. The moving Creditors appeared by Richard Peterson-Klein of Fisher, Patterson, Sayler & Smith, LLP. William H. Griffin, the Chapter 13 Trustee (Trustee) appeared in person. The United States Trustee, Mary May, appeared by William H. Griffin at the August 19, 2005 hearing.

The Debtors filed a voluntary petition for relief under Chapter 13 on November 9, 2004. Schedules D (creditors holding secured claims), F (creditors holding nonpriority unsecured claims), I (current income of individual debtor(s)), and J (current expenditures of individual debtor(s)) were filed with the petition. Schedules I and J, and the plan, were amended before the 341 hearing was held on December 23, 2004.⁴ On April 15, 2005, the Creditors moved to dismiss, contending that Debtors are not eligible for chapter 13 relief as defined by 11 U.S.C.A. 109(e)⁵ because they do not have regular income and Debtors' noncontingent, liquidated, unsecured debts exceed the statutory limit of \$307,675. The Creditors also contend Debtors did not file their petition in good faith, such that the case should be dismissed pursuant to section 1307(e). The show cause motion seeks an order

² Doc. 69.

³ Doc. 79.

⁴ Doc. 10.

⁵ Future references to the Bankruptcy Code in the text shall be to section only.

directing the Debtors to appear and show cause why they should not be held in contempt for failure to comply with previous orders compelling the production of documents. After considering the testimony presented, the exhibits admitted, and the post-trial memoranda submitted by the Creditors and the Debtors, the Court is now ready to rule.

FINDINGS OF FACT.

The Debtors filed a voluntary petition under Chapter 13 and their related schedules on November 9, 2004. Schedule D reports secured debts of \$381,440.28, with the unsecured portion of the debts being \$8,055. Schedule F lists creditors holding unsecured nonpriority claims in the total amount of \$3,939,538.54. When the unsecured claims identified by the Debtors on Schedule F as contingent or unliquidated are removed, the total noncontingent, liquidated, unsecured nonpriority claims are \$275,084.64.⁶

Schedule F includes eight claims which were not identified as either contingent or liquidated where the amount owed was listed as “unknown.” The testimony at trial established that as of the date of filing the total claim of Kansas University Medical Center, which was one of the foregoing eight claims, was in the amount of \$150,710.52. Because Schedule F includes \$1,387 of the medical center’s claim under separate lines from that where the claim is listed as “unknown,” the determination of the total amount owed to the Kansas University Medical Center increases the total unsecured noncontingent, liquidated claims by the amount of \$149,323.52. In addition, a timely proof of claim filed by the Kansas Department of Revenue, establishes that the department’s unsecured liquidated,

⁶ Creditors Ex. 24, modified it to deduct \$10,000 for the Accounts Receivable Setoff, which was listed as contingent.

noncontingent claim, the amount of which was also listed as “unknown,” was in fact \$4,235 on the date of filing. Although there was evidence concerning the amount of at least one additional “unknown” claim, one undisclosed claim, and an underreported claim, the Court makes no findings on these debts because they are not necessary for resolution of the case.

Amended Schedule I, Current Income of Individual Debtor(s), lists two sources of income, \$3,250 from operation of a business or profession, and a \$3000 as income from real property. There is no detailed statement attached explaining the \$3,250 per month income. Amended Schedule J, current expenditures, shows monthly expenses of \$5,436.13, leaving a projected \$813.57 available for plan payments.

As to the income, Mr. Schmidt testified that Bruce Coleman, his nephew, is the owner of JHS Coleman Co., for which Mr. Schmidt provides consulting services, identified in Amended Schedule I as income from a business or profession. Mr. Schmidt’s testimony, which was generally vague, unresponsive, and evasive, did not establish the means by which the value of the consulting services was to be determined. Although Mr. Schmidt testified that previously earned payments for consulting services were past due, he did not know the amount of the arrearage or the date of anticipated receipt. At the 341 hearing, Mrs. Schmidt testified that she was disabled, but her claim for social security disability income had been denied twice.

Testimony established that JHS Coleman Co. rented an office in the Debtor’s home, thereby generating the \$3000 in monthly income from real property. However, Mr. Schmidt testified that because of Coleman’s rent arrearage, the first mortgage holder on the Debtor’s home would be

granted relief from stay⁷ and allowed to foreclose on the home. Mr. Schmidt acknowledged that because the Debtors would no longer own the home, the monthly payment would cease being an obligation of Coleman to the Debtors, and Debtors' monthly income would be reduced by \$3000.

CONCLUSIONS OF LAW.

A. Debtors are not Eligible for Chapter 13.

1. Debtors are not Eligible for Chapter 13 because their Unsecured, Noncontingent, Liquidated Debts Exceed the Statutory Limit.

Section 109 of the Code establishes who may be a debtor. As to a Chapter 13 relief, subsection (e) provides:

(e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than \$307,675 and noncontingent, liquidated, secured debts of less than \$922,975, or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than \$307,675 and noncontingent, liquidated, secured debts of less than \$922,975, maybe a debtor under Chapter 13 of this title.

The primary basis for the Creditors' assertion of noneligibility is the amount of Debtors' debt. There is no dispute that the Debtors secured debts, listed on Schedule D to be \$381,440.28, are less than the statutory limit of \$922,975. The dispute centers upon the Debtors' unsecured debts. The Creditors assert that the Debtors noncontingent, liquidated, unsecured debts exceed the statutory limit of \$307,675. For the reasons stated below, the Court agrees.

⁷ See Doc. 88.

Section 109(e) directs the Court to evaluate the amount of unsecured debt on the date of filing. There is no clear direction from the 10th Circuit of how to proceed. Courts agree that the debtor's filed schedules play a central role in determining eligibility to file for chapter 13, but they diverge as to the details of the analysis. In some circuits, courts are directed "to rely primarily upon the debtor's schedules, checking only to determine if they were filed in good faith."⁸ Other courts hold that even when the schedules are filed in good faith, the schedules are not dispositive on the question of eligibility but are only a starting point.⁹ If the schedules were dispositive, a debtor having no reasonable perception of his liabilities would have an advantage over the debtor who was aware of his bad situation.¹⁰ Further, a debtor "cannot circumvent this limitation on eligibility by simply ignoring what he knows and listing the amounts of the debts as 'unknown' in his schedules. To decide otherwise would eviscerate the chapter 13 eligibility requirements."¹¹

Given the circumstances of this case, it is clear that the Court cannot determine eligibility from the filed schedules alone. Debtor listed eight of his unsecured debts as "unknown." This fact indicates to the Court the possibility that the schedules were not filed in good faith. As discussed elsewhere, the Creditors offered evidence of the amount of some of these liabilities. To the extent that the amounts are established by the evidence, they must be included in the calculations. Further, the Court is

⁸ *Scovis v. Hendrichsen (In re Scovis)*, 249 F.3d 975, 982 (9th Cir. 2001); *Comprehensive Accounting Corporation v. Pearson (In re Pearson)*, 773 F.2d 751, 757 (6th Cir. 1985).

⁹ *In re McGovern*, 122 B.R. 712, 714 (Bankr. N.D. Ind. 1990), citing *In re Edwards*, 51 B.R. 790, 791 (Bankr. D. N. M. 1985).

¹⁰ *In re Edwards*, 51 B.R. at 791.

¹¹ *In re Redburn*, 193 B.R. 249, 256 (Bankr. W.D. Mich. 1996).

confronted with evidence offered by the Debtors seeking at trial to orally amend their filed Schedule F to reduce the amount of the scheduled noncontingent, liquidated, unsecured debts. Filed schedules, signed under oath, create a presumption of debts in the amounts listed. Only in extraordinary circumstances should such oral evidence be considered competent to amend a debtor's position as to liabilities on the date of filing.

The Code does not define noncontingent, liquidated debts. Case law, however, has adopted well defined meanings. "It is generally agreed that a debt is contingent if it does not become an obligation until the occurrence of a future event, but is noncontingent when all of the events giving rise to liability for the debt occurred prior to the debtor's filing for bankruptcy."¹² "The majority of courts considering the question have held that merely because a debtor disputes a debt, or has potential defenses or counterclaims that might reduce a creditor's actual collection, the debt is not thereby rendered 'contingent' or 'unliquidated.'"¹³ A debt is considered liquidated "if the amount is readily ascertainable."¹⁴

In this case, the Debtors' Schedule F lists the unsecured, noncontingent, liquidated debts to be \$275,084.64. Schedule F also includes eight unsecured, noncontingent, liquidated debts for which the amount is listed as "unknown." The evidence at trial established that these "unknown" debts included \$149,323.02 owed to the Kansas University Medical Center and \$4,255 owed to the

¹² *In re Krupka*, 317 B.R. 432, 436 (Bankr. D. Colo. 2004), quoting *Mazzeo v. U.S. (In re Mazzeo)*, 131 F.3d 295, 303 (2nd Cir. 1997).

¹³ *In re Hanson*, 275 B.R. 593, 596 (Bankr. D. Colo. 2002), quoting *In re Crescenzi*, 69 B.R. 64,65 (S.D.N.Y. 1986).

¹⁴ *In re Hanson*, 275 B.R. at 596.

Kansas Department of Revenue. When these amounts are added to the \$275,084.64 classified by the Debtors on Schedule F to be unsecured, noncontingent, liquidated debt, the statutory limit of \$307,675 is greatly exceeded.

The Debtors' response is two fold. First, they seek by oral testimony at trial to reclassify many liabilities listed on their Schedule F as noncontingent, liquidated, unsecured claims. Second, they argue that the Kansas University Medical Center and Department of Revenue debts are contingent and unliquidated. The Court rejects both of these positions.

Although they have not filed an amended Schedule F, Debtors oppose dismissal based upon the foregoing analysis by attempting at trial to reclassify many of the debts listed on Schedule F into five categories other than noncontingent, liquidated debt. The result of this process is that Debtors' unsecured, noncontingent, liquidated debt would be only \$62,346.40, without consideration of the University of Kansas Medical Center debt and the Kansas Department of Revenue debt. Much of this reduction is accomplished by reclassifying debts, including the medical services debts, as contingent. Debtors offer no evidence of extraordinary circumstances which would justify this attempt to orally amend their filed schedules. Further, their oral evidence that the debts now claimed to be contingent is not credible.¹⁵ The Court adopts the classification stated in Debtors' Schedule F.

¹⁵ The evidence as to the contingent nature of the liabilities listed on the Schedule F as noncontingent is most convincing with respect to three "Viatical" claim, those of Donald Elliott (\$55,195.25), Charles & Erma Worley(\$55,126.00), and Lawrence Shops (\$10,416.00). If these claims were removed from the total of the unsecured, noncontingent, liquidated debts found below in the amount of \$428,643.12, the balance would still exceed the limit of \$307,675.

The Debtors' contention that their medical claims are either contingent or unliquidated is also rejected by the Court. The primary basis for their position is the contention that the claims for medical services are being submitted to the Social Security Administration because Mrs. Schmidt is entitled to Medicare coverage. The Debtors' testimony in this regard is confusing and not credible. The exhibits show that \$103,988.52 of the Kansas University hospital charges were incurred for an admission in July, 2003. The statement from Kansas University Physicians for over \$22,000 is dated November, 2003. The Debtors' exhibit regarding Medicare coverage appears to establish eligibility commencing on October 1, 2005.¹⁶ The Court is not convinced that Medicare would have any liability for these bills given the circumstances of this case. More importantly, even if Medicare would have liability for a portion or even all of these debts, that would not remove them from the calculation of unsecured, noncontingent, liquidated debts for eligibility to file a Chapter 13 plan. The Debtors' liability for these and similar debts had been established before the date of filing. Their liability was not contingent upon a future event which could occur after filing. The fact that the Debtors contest their liability, because of their assertion that Medicare should pay all or a portion of the debts, does not render the debts unliquidated. The amount of all of the debts in issue was fixed as of the date of filing. They cannot be classified as either contingent or unliquidated.

The evidence establishes that the amounts owed by Debtors to the University of Kansas Medical Center and the Kansas Department of Revenue were unsecured, noncontingent, liquidated debts on the date of filing. For purposes of determining eligibility under Chapter 13, these debts, in the

¹⁶ See Debtors' Exhibit B.

amount of \$152,558.52, must be added to the unsecured, noncontingent, liquidated debts listed by the Debtors on their schedule F. The total unsecured, noncontingent, liquidated debts are \$428,643.16.

For the foregoing reasons, the Court concludes that Debtors' unsecured, noncontingent, liquidated debts on the date of their filing under Chapter 13 exceeded the \$307,675 limit established by section 109(e). Debtors were not eligible for Chapter 13 relief.

2. Debtors are not Eligible for Chapter 13 because they do not have Regular Income.

Creditors also assert that Debtors were not eligible for Chapter 13 because they did not have regular income. An "individual with regular income" is defined by the Code as an "individual whose income is sufficiently stable and regular to enable such individual to make payments under chapter 13."¹⁷ Section 109(e) does not specifically state the date on which the regular income requirement is to be determined, and the courts have not agreed on this question.¹⁸ Given the conflicting case law, a commentator submits that the "better rule would ask whether the debtor, at the time of the motion, has net income, or a reasonable prospect of realizing net income, sufficient to meet the funding requirements, if any, of a Chapter 13 plan."¹⁹ The debtor has the burden of proving that future prospects for regular and stable income are sufficient to fund a plan.²⁰

¹⁷ 11 U.S.C.A. § 101(30).

¹⁸ 1 Norton Bankruptcy Law and Practice 2d §18:11 (Norton, auth & ed.-in-chief 1997).

¹⁹ *Id.*

²⁰ *In re Sassower*, 76 B.R. 957 (Bankr. S.D.N.Y. 1987).

Debtors have not fulfilled that burden. In their post hearing memorandum, the Debtors did not even address their projected income, even though the Creditors' motions to dismiss raised this additional ground for dismissal. The Court finds that the Debtors do not have regular income as required by section 109(e). Debtors' Amended Schedule I reports projected income of \$6,250 per month. However, at the 341 hearing, it was established that \$3000 of the projected \$6,250 income would not continue because of Debtors' loss of their home, a portion of which had been rented to create the \$3000 income from real property. It was also established at the 341 hearing that the anticipated \$3,250 per month for consulting services was to be paid by a relative of the Debtor. The trial testimony did not establish a basis for determination of the amount of payment to the Debtor. Nor did the testimony establish that money for consulting services had been paid to Debtor since the case was commenced. The Debtors' prospect of regularly receiving even \$3,250 monthly is uncertain at best. Debtors' current expenditures as stated in Amended Schedule J are \$5,436.13 per month. If Debtors receive the \$3,250 per month for consulting services, there would be a monthly deficit and no ability to fund a plan. The Court concludes that the evidence does not establish a reasonable prospect that the Debtors will have regular stable income sufficient to fund the proposed amended plan or any other plan.

For the foregoing reasons, the Court finds that the Debtors are not eligible for relief under Chapter 13 because they are not individuals with regular income, as required by section 109(e).

B. The Court Declines to Address the Creditors' Motion to Dismiss for Cause under Section 1307.

The Creditors also contend that the bankruptcy should be dismissed pursuant to section 1307 for cause because of the Debtors' alleged failure to accurately list their debts, to disclose a business entity formed to collect consulting services income, and to comply with the Court's orders compelling the production of documents. Since the Court has found, for the reasons stated above, that the Debtors are not eligible for relief under Chapter 13, the Court declines to address dismissal for cause under section 1307, a Code section which is applicable to debtors who are eligible for relief under Chapter 13.

C. The Motion for an Order to Show Cause is Denied as Moot.

The Creditors filed a motion for an order to show cause why the Debtors should not be held in contempt for failure to comply with the Court's orders compelling the production of documents by the Debtors. The Court finds this motion moot. At the evidentiary hearing, it was apparent to the Court that, notwithstanding the Debtors' failure to cooperate with discovery, the Creditors obtained the documents necessary to build their case in support of dismissal based upon lack of eligibility. The Court has found in the Creditors favor on this issue. Requiring the Debtors to appear to show cause why they should not be held in contempt would serve no useful purpose, since this proceeding must be dismissed.

CONCLUSION.

For the reasons stated above, the Court finds that the Debtors are not eligible for Chapter 13 relief because they do not have regular income and because their unsecured, noncontingent, liquidated debts exceed the limit established by section 109(e). This case must be dismissed. The foregoing constitutes Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of

Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based upon this ruling will be entered by separate document as required by Federal Rule of Bankruptcy Procedure 9021 and Federal Rule of Civil Procedure 58.

IT IS SO ORDERED.

###